Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1778

JOHN C. RUSSELL,
Appellant,

vs.

CITY OF RAYTOWN, MISSOURI,
Appellee.

ON APPEAL FROM THE MISSOURI COURT OF APPEALS,
KANSAS CITY DISTRICT

JURISDICTIONAL STATEMENT

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. .....

JOHN C. RUSSELL,
Appellant,

vs.

CITY OF RAYTOWN, MISSOURI,
Appellee.

ON APPEAL FROM THE MISSOURI COURT OF APPEALS,
KANSAS CITY DISTRICT

JURISDICTIONAL STATEMENT

Notice is given that Appellant appeals from the judgment entered on Count I of his Petition by the Circuit Court of Jackson County, Missouri on December 19, 1974, concerning his appointment by the Board of Aldermen by Ordinance as City Counselor for the City of Raytown and his purported termination of duties of said office by Resolution, said Motion to Amend Judgment and/or for New Trial being overruled on March 14, 1975. The Missouri Court of Appeals, Kansas City District, sustained the issue on Count I of Appellant's Petition and did reverse the affirmative finding of said Circuit Court on Count II of Appellant's Petition on November 1, 1976. Appellant's Motion for Rehearing by the Court of Appeals on both issues, or in the alternative, Application for Transfer to the Missouri Supreme Court was denied on November 29, 1976.

Further, the Supreme Court of Missouri denied Appellant's Application to Transfer on January 10, 1977, and on March 14, 1977, said Supreme Court denied Appellant's Petition for Writ of Certiorari submitted to said Court.

OPINIONS BELOW

The opinions of the Circuit Court of Jackson County, Missouri (together with Judgment Entry) and the Missouri Court of Appeals, Kansas City District, are set forth in Appendix A to this statement.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C.A. 2101(c). Cases which sustain the jurisdiction of this Court include *Mergenthaler Linotype Co.* v. *Davis,* (1920) 251 U.S. 256, 64 L.Ed. 255, 40 S.Ct. 133; *Gallick* v. *Baltimore & O. R. Co.,* (1963) 372 U.S. 108, 9 L.Ed.2d 618, 83 S.Ct. 659; *Harrison* v. *Missouri P. R. Co.,* (1963) 372 U.S. 248, 9 L.Ed.2d 711, 83 S.Ct. 690; *Andrews* v. *Virginia R. Co.,* (1919) 248 U.S. 272, 63 L.Ed. 236, 39 S.Ct. 101; *Rosenblatt* v. *American Cyanamid Co.,* in Chambers Opinion, U.S. S.Ct., July 13, 1965, 15 L.Ed.2d 39, 86 S.Ct. 1; *MacNeil Brothers Co.* v. *Justices of the Superior Court,* (C.A.1) 242 F.2d 273, affirming 137 F.Supp. 687; *Murray* v. *Charleston,* (1878) 96 U.S. 432, 24 L.Ed. 760; *Dewey* v. *Des Moines,* (1899) 173 U.S. 193, 43 L.Ed. 665, 19 S.Ct. 379. Alternatively, should this Court determine that an appeal does not lie under 28 U.S.C.A. 2101(c), Appellant respectfully moves this Court to consider this Jurisdictional Statement as a Petition for Certiorari, 28 U.S.C.A. 1257(3).

QUESTIONS PRESENTED BY THIS APPEAL

The questions presented by this appeal are as follows:

Whether the opinion of the Missouri Court of Appeals, Kansas City District deprived Plaintiff of his right to due process under the Fourteenth Amendment by ruling the effect of a Resolution terminating Appellant's employment as City Counselor to be controlling and superseding an Ordinance passed by the Board of Aldermen hiring said Appellant in direct conflict with decisional authority of the Missouri Supreme Court, and, further, by failing to base its opinion upon the facts as stated in the record to the effect that Appellant was not appointed by the Mayor of said City but rather by its Board of Aldermen and thus not subject to statutory provisions as contended by the City of Raytown, together with failing and refusing to recognize a contractual relationship created by the City with Appellant in the form of a Personnel Code adopted by said City guaranteeing Appellant and all those in like capacity to a hearing on involuntary dismissal, said action by said Court being further compounded by the failure and refusal of the Supreme Court of Missouri to review the ruling of the inferior Court by denying a Motion to Transfer to said Supreme Court and by refusing to entertain a Writ of Certiorari directed to said Supreme Court.

STATE STATUTORY PROVISIONS INVOLVED

Section 79.240 R.S.Mo. (1969) provides in part:

". . . The mayor may, with the consent of a majority of all the members elected to the board of aldermen, remove from office any appointive officer of the city

at will, and any such appointive officer may be so removed by a two-thirds vote of all the members elected to the board of aldermen, independently of the mayor's approval or recommendation. The board of aldermen may pass ordinances regulating the manner of impeachments and removals."

CITY ORDINANCE INVOLVED

City of Raytown Ordinance No. 114-69 adopted March 18, 1969, known as Personnel Code provides in part:

"A. No person in the employ of the City of Raytown, * * * shall be * * * removed * * * on any basis or for any reason other than qualifications, merit and fitness for the service or the lack thereof, or violation of the personnel rules set out herein, as determined by the particular hiring authority and/or Board of Aldermen."

STATEMENT

This appeal stems from an action brought by Appellant in the Circuit Court of Jackson County, Missouri, to recover damages from Appellee, City of Raytown, for wrongful termination of his services as City Counselor and refusal to accord Appellant a hearing with regard thereto.

On or about May 7, 1968, following a creation of the separate offices of City Prosecuting Attorney and City Counselor, Appellant was appointed to the latter office by the Board of Aldermen by enactment of its Ordinance No.

32-68, calling for an annual salary in the amount of $13,500.00 payable at the rate of $1,125.00 per month.

Thereafter, on March 18, 1969, the said City duly enacted Ordinance No. 114-69 generally referred to as the Personnel Code of the City of Raytown which provided, in part, that "No person in the employ of the City of Raytown, or seeking employment shall be appointed, promoted, reduced, removed, advanced, or retarded on any basis or for any reason other than qualifications, merit and fitness for the service or the lack thereof, or violation of the personnel rules set out herein, as determined by the particular hiring authority and/or Board of Aldermen."

Further, incorporated into a section of said Code under the general heading of Discipline and Grievances was Section 2-B which provides that "any employee suspended or discharged as provided for in Section 2-A shall, within ten (10) days following his suspension or discharge, apply, in writing and deliver to the Office of the City Clerk, for a hearing before the Board of Aldermen with said hearing to be held by said Board within fifteen (15) days following receipt of written application therefor by the said Office of City Clerk."

Thereafter, on April 20, 1971, at a regular meeting of the Board of Aldermen of said City, Appellant was, without reason or cause, dismissed from his office by Resolution in the form of Administrative Order No. 001 of the Mayor of said City and thereafter was discriminately refused a request for hearing on said dismissal, in contravention of the provisions of said Personnel Code.

The Circuit Court of Jackson County, Missouri, rendered judgment in favor of the Appellee City on Count I

of Appellant's Petition (stating, in effect, that the Resolution terminating Appellant superseded the Ordinance of hiring him, thus ruling contrary to decisional authority of the Supreme Court of the State of Missouri) but upheld Appellant's Petition as to Count II on the basis of rights given to him under the Personnel Code, same being contractual in nature and violated by the City. The Missouri Court of Appeals sustained the lower court as to Count I of said Petition but reversed the judgment as to Count II of same, failing to recognize that Appellant was appointed by the Board of Aldermen by Ordinance, and not by the Mayor as the evidence clearly and irrefutably showed. Thus, said Court failed and refused to recognize the right given him by the City in passage of the Personnel Code relative to dismissal only for cause, following hearing, the result being that Appellant was deprived of his property without due process of law in violation of the provision of the Fourteenth Amendment to the Constitution of the United States. A timely Motion for Rehearing and for Transfer to the Missouri Supreme Court was filed with the Missouri Court of Appeals, Kansas City District, both being denied on November 1, 1976; thereafter, timely Motion for Transfer to Supreme Court was filed with the latter Court, same being denied on January 10, 1977, followed by Writ of Certiorari to said Court, which was also denied on March 14, 1977, by said Supreme Court.

THE QUESTION PRESENTED IS SUBSTANTIAL

The question presented is substantial and of broad public importance. It involves the fundamental guarantee of due process as provided by the Fourteenth Amendment to the United States Constitution and touches upon the rights of litigants in similar situations throughout the entire country.

The question involves the application of an Ordinance in the form of a Personnel Code duly passed by the Board of Aldermen of the City of Raytown, a fourth class municipality within the State of Missouri contracting and agreeing with Appellant and all other like employees of said City that they would be granted an opportunity to be heard prior to any involuntary dismissal from employment, thereby depriving Appellant of his constitutional rights, including that right to be notified and heard as established by Ordinance, all in violation of said Fourteenth Amendment. Further, Appellant was again deprived of said constitutional rights by being the victim of a decision of an Appellate Court in the State of Missouri that failed to recognize any effective difference between a Resolution and an Ordinance as contained in its opinion with its entire opinion being contrary to decisional authority of the Supreme Court of Missouri; thereafter, said opinion was denied a review by the Supreme Court of the State of Missouri, both in the form of Motion to Transfer to the said Supreme Court and upon a Petition for Certiorari. According to the ruling in *Mergenthaler Linotype Co.* v. *Davis*, supra, this Court has jurisdiction to hear this appeal.

Alternatively, Appellant respectfully requests that this Court consider the matter as a Petition for Writ of Cer-

tiorari should the Court decide an appeal does not lie. 28 U.S.C.A. 1257(3).

Appellant's rights under the due process clause of the Fourteenth Amendment to the United States Constitution were violated by the Missouri Court of Appeals, Kansas City District, in rendering its opinion according no effect to the superiority of an Ordinance as opposed to a Resolution (contrary to the decisional authority of the Missouri Supreme Court) and, again, by opinion of said Court depriving Appellant of a right to be heard as allotted to him by Ordinance in the event of an involuntary dismissal as an employee of said City; further, Appellant's rights were ignored by the opinion of said Court in its failure to recognize and give effect to the undisputed fact, as stated in the record of the within cause, that Appellant was not appointed by the Mayor of said City but rather by its Board of Aldermen which, thereafter, tendered to him, in the form of a contractual agreement, the right not to be dismissed without cause and hearing in the form of a Personnel Code as adopted and ordained by said City.

To permit this decision of the Missouri Court of Appeals to stand, coupled with the condoning of the inaction of the Supreme Court of Missouri by failing and refusing to review said opinion either by Motion to Transfer or via Petition for Writ of Certiorari (both requests presented to said Supreme Court by Appellant and denied by said Court), would constitute a travesty of justice and be contrary to the guarantee of the Fourteenth Amendment to the United States Constitution according Appellant the right to due process of law.

The action of a Court in depriving a party of substantive rights without adequate notice and opportunity

to defend, constitutes denial of due process, *Bowie* v. *West Jefferson*, 231 N.C. 408, 57 S.E.2d 559. In *People* v. *Pomeroy*, 405 Ill. 175, 90 N.E.2d 102, it was held that the Court violated due process in sentencing an attorney for contempt, without hearing, for remarks constituting alleged contempt were made out of hearing of the Court in an anteroom reserved for attorneys and clients. In the instant cause, Appellant was denied a hearing with respect to his involuntary dismissal by the City of Raytown as its City Counselor, albeit said right being given to him and all other employees of the City, by Ordinance and in the form of its Personnel Code, thus being discriminatory against said Appellant and condoned by Court opinion, as aforesaid.

A rational explanation for different treatment of one corporation could not be found where that corporation was taxed according to state statute in a manner unlike that for other corporations. The Court reviewed the statute and found it to be violative of the equal protection and due process clauses of the United States Constitution. *Raymond* v. *Chicago Union Traction Co.*, 207 U.S. 20, 28 S.Ct. 7, 52 L.Ed. 78 (1907).

In *Barber* v. *Connolly*, 113 U.S. 27, 5 S.Ct. 357, 28 L.Ed. 923 (1884), where a state statute did not allow wash houses in certain areas of the city of San Francisco, the Court reviewed the statute and said, "Class legislation, discriminating against some and favoring others, is prohibited by the Fourteenth Amendment."

Expanding on this idea, the Court added in *Reed* v. *Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971) that "a classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a

fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." In this case the Court granted an appeal to study an Idaho statute which provided that as between persons equally qualified to administer estates, males must be preferred to females. The Court found this to be based solely on discrimination and violative of the due process clause.

Again the Court granted appeal in *Eisenstadt* v. *Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972) and said that a Massachusetts law allowing for the dispersal of contraceptives to married persons only provided dissimilar treatment to married and unmarried people and therefore violated due process.

In Re Green, 369 U.S. 689, 8 L.Ed.2d 198, 82 S.Ct. 1114 reviewing 172 Ohio St. 269, 175 N.E.2d 59, petitioner therein, an attorney who advised his client, a Union, to continue picketing despite a State Court injunction because, inter alia, he was of the opinion that the controversy was properly one for the N.L.R.B. and not for the State Court, was denied due process when convicted of contempt without hearing and opportunity to establish that the State Court was acting in a field reserved exclusively for the N.L.R.B. by Congress.

Any arbitrary discrimination against a certain class such as is present in the instant case is discriminatory and violative of the Due Process Clause of the Fourteenth Amendment.

Due Process requires a hearing before a deprivation of a right or property is allowed. *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406. (Distinguishable in that it involves physical seizure of property.) "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Baldwin* v. *Hale*, 1 Wall. 223.

This right to be heard insures fair play to the individual and protects his use and possession of property from arbitrary encroachment, minimizing unfair or mistaken deprivations of property. *Lynch* v. *Household Finance Corp.*, 405 U.S. 538.

"The requirement of notice and an opportunity to be heard raises no impenetrable barrier to the taking of a person's possessions. But the fair process of decision making that it guarantees works, by itself, to protect against arbitrary deprivation of property. For when a person has an opportunity to speak up in his own defense, and when the State will listen to what he has to say, substantially unfair and simply mistaken deprivation of property interests can be prevented." *Fuentes* v. *Shevin*, 407 U.S. 67. (Distinguishable because it deals with the physical seizure of property without a hearing.)

(Here Appellant, an employee of the City was discriminated against by the effect of Court opinion, as heretofore stated, in that he was refused a hearing with respect to his involuntary dismissal as City Counselor to determine whether or not said dismissal was for cause and lack of merit.)

In conclusion, the Questions Presented are so substantial as to require plenary consideration, with brief on the merits and oral argument, for its resolution.

CONCLUSION

For the reasons stated, probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX

APPENDIX A

(Seal)
CIRCUIT COURT
Sixteenth Judicial Circuit of Missouri
Division Ten
Court House, Kansas City 64106
Harry A. Hall, Judge

December 4, 1974

Mr. Robert K. Ball II
Jackson & Sherman
820 Home Savings Building
1006 Grand Avenue
Kansas City, Missouri 64106

Mr. Richard T. Cole
Laurel Bank Building, Suite 200
9063 East Gregory Boulevard
Kansas City, Missouri 64133

Gentlemen:

No. 757520, *John C. Russell* v. *City of Raytown, Missouri*

After careful consideration of the briefs and the record, I have come to the conclusion that judgment should be entered in favor of the plaintiff on Count II of his petition.

Plaintiff was employed by action of the city council on May 7, 1968, and became an employee within the terms of the personnel code which was subsequently adopted by

the city on March 18, 1969, Ordinance No. 114-69. That code provided:

> "A. No person in the employ of the City of Raytown, * * * shall be * * * removed * * * on any basis or for any reason other than qualifications, merit and fitness for the service or the lack thereof, or violation of the personnel rules set out herein, as determined by the particular hiring authority and/or Board of Aldermen."

The evidence discloses that plaintiff was discharged without any determination by the Board of Aldermen of any cause for his removal, and in violation of the above ordinance.

While Section 79.240 RSMo. authorizes a city to discharge an employee at will by the Board of Aldermen, this statute is not mandatory and would not preclude the city from entering into contractual arrangements giving additional rights to employees.

It would follow then that on the basis of the ordinance the city could not discharge the plaintiff or remove him from office on any basis other than those involving his qualifications, merit and fitness, or for "violation of the personnel rules" as determined by the hiring authority, which in this instance was the city council. Since the city council made no such determination, the discharge was in violation of the ordinance.

Counsel for plaintiff may submit a proposed entry.

Yours very truly,

/s/ Harry A. Hall
Harry A. Hall

IN THE
CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

Case No. 757,520
Division No. 10

JOHN C. RUSSELL,
Plaintiff,

vs.

CITY OF RAYTOWN, MISSOURI,
Defendant.

JUDGMENT ENTRY

On April 22, 1974, this cause came on regularly for hearing, plaintiff appearing in person and by and through his attorneys, Jackson & Sherman, by and through Robert K. Ball II, and defendant appeared by and through its attorney, Richard T. Cole; the parties adduced evidence in support of their respective positions and submitted the matter to the Court for its ruling and the Court, after being fully advised in the premises finds the issues in favor of plaintiff on Count II of plaintiff's Petition and that, as of the date of trial, there was due plaintiff the sum of Forty Thousand Five Hundred Seventy Three Dollars and 96/100 ($40,573.96) as compensation specified, together with interest accrued as of that date of Three Thousand Two Hundred Seventy Three Dollars and 78/100 ($3,273.78) and that interest of One Thousand Six Hundred Dollars ($1,600.00) has accrued since said date; now, therefore

IT IS ORDERED, ADJUDGED AND DECREED plaintiff have and recover judgment against defendant in the principal sum of Forty Thousand Five Hundred Seventy

Three Dollars and 96/100 ($40,573.96) together with interest of Four Thousand Eight Hundred Seventy Three Dollars and 78/100 ($4,873.78), or a total judgment of Forty Five Thousand Four Hundred Forty Seven Dollars and 74/100 ($45,447.74) and costs herein are taxed against defendant for which let execution issue.

Dated: December 19, 1974.

/s/ Harry A. Hall
Judge

MISSOURI COURT OF APPEALS
KANSAS CITY DISTRICT

No. KCD 27,921

JOHN C. RUSSELL,
Plaintiff-Respondent,

v.

CITY OF RAYTOWN,
Defendant-Appellant.

and

No. KCD 27,922

JOHN C. RUSSELL,
Plaintiff-Appellant,

v.

CITY OF RAYTOWN,
Defendant-Respondent.

Appeal From the Circuit Court of
Jackson County, Missouri
Honorable Harry A. Hall, Judge

(Filed November 1, 1976)

Before Turnage, P.J., Welborn and Higgins, Sp. JJ.

John C. Russell was appointed city attorney of the City of Raytown, a fourth class city, in May, 1968, and served until he was removed in April, 1971. Sections 79.230 and 79.240, RSMo 1969. Following his dismissal, Russell filed suit against the City in which he contended his removal was ineffective because he had been appointed by ordinance but had been removed by resolution of the Board of Aldermen and because he was not accorded notice

and hearing at which cause for his dismissal was shown, as provided by the personnel ordinance of the City.

The court found the removal of Russell to be ineffective because the City had failed to follow its personnel ordinance and awarded Russell back pay of $40,573.96, together with $3,273.78 as interest up to trial time, and $1,600 interest from date of trial to entry of judgment.

The City has appealed in KCD 27,921 on the grounds the personnel ordinance is in violation of §79.240, and, therefore, inapplicable to Russell. Russell has appealed in KCD 27,922 from the failure of the trial court to find in his favor on the ground he was dismissed by resolution when he had been appointed by ordinance. He requests such appeal be considered only if the City's appeal is ruled favorable to the City. Reversed.

Following previous service as city attorney of Raytown, Russell was appointed city attorney in May, 1968. The only evidence in the record of his appointment is an ordinance passed by the Board of Aldermen in which it was stated that Russell was appointed "City Counselor".

Section 79.230 grants to the mayor of a fourth class city, with the consent and approval of the majority of the members of the Board of Aldermen, the power to appoint a city attorney. No point is made in this case concerning the failure of the record to show Russell's appointment by the mayor with the consent and approval of the Board, and this court will not take further note of that fact. At the least, Russell was a de facto city attorney.

In April, 1971, a new mayor was elected in Raytown. Immediately following his election, the mayor telephoned

Russell and told him he wanted to hire a different city attorney. Despite the request of Russell, the mayor refused to give any specific reason for his desire to change city attorneys.

At the first meeting of the Board after the new mayor was sworn into office, the mayor presented the Board of Aldermen an "administrative order" in which he stated that subject to the approval of a majority of the Board of Aldermen, Russell was thereby removed from the appointive office of city counselor. No action was taken on this order at that meeting, but when the Board met the following week, a resolution was passed approving the order removing Russell. The resolution was approved by a vote of seven in favor, two against, and one absent. The resolution was, therefore, approved by a majority of all of the members of the Board.

In 1969, the Raytown Board enacted an ordinance referred to as the "personnel code". This ordinance generally established a merit system for the hiring and retention of employees by the City. The office of city attorney, or city counselor, was not mentioned in the ordinance, although it did refer to "those persons appointed by the mayor and/or Board of Aldermen." The personnel ordinance prohibited the firing of any employee except for cause and required notice and hearing in the event discharge was contemplated.

In the City's appeal, it contends the personnel code cannot apply to the position of city attorney because of the provisions of §79.240. That Section provides as far as pertinent here:

> The mayor may, with the consent of a majority of all the members elected to the board of aldermen,

remove from office any appointive officer of the city at will, and such appointive officer may be so removed by a two-thirds vote of all the members elected to the board of aldermen, independently of the mayor's approval or recommendation. The board of aldermen may pass ordinances regulating the manner of impeachments and removals.

The City contends this Section gave the mayor, with the consent of a majority of all the members of the Board, the power to remove Russell as city attorney at any time, without cause and without notice or hearing. The City contends Russell is not included within the meaning of the personnel code, but even if he is, that ordinance could not apply to him because such ordinance would conflict with §79.240 by restricting the power of the mayor and the Board to remove the city attorney.

It is, of course, a matter of settled law that an ordinance of the City must be in harmony with State statutes. §71.010, RSMo 1969, Kansas City v. LaRose, 524 S.W. 2d 112, 116[6] (Mo. banc 1975).

Russell concedes §79.240 states that the mayor may remove an appointive officer, i.e., the city attorney, at will, but claims that removal at will is a summary procedure and statutes providing for a summary procedure are to be strictly construed. He further contends it is impermissible to allow the Board to act through a summary procedure to remove persons appointed by ordinance except through the enactment of another ordinance.

This court accepts the proposition that removal at will is a summary procedure and statutes providing for such a procedure should be strictly construed. However, strictly construing §79.240, it remains that this Section

clearly gives the mayor, with the consent of a majority of all the members of the Board, the power to remove the city attorney at will. The term "at will" is defined by Webster's Third New International Dictionary (1971) as "as one wishes: as or when it pleases or suits oneself: subject to one's discretion or pleasure: at one's disposal." This statute needs no construction to hold that the mayor is given the power to remove the city attorney at any time it suits his pleasure, provided a majority of all the members of the Board consent.

Because the State law confers on the mayor the power to remove the city attorney at any time it suits his pleasure, with the consent of the majority of all members of the Board, it follows an ordinance of the city which in any way restricts this power is contrary to the State law and cannot impinge the authority of the mayor to remove the city attorney. §71.010. This does not constitute a holding that the personnel code of the City of Raytown is contrary to State law, and, therefore, void. This holding is confined to the narrow ground that the personnel code does not place the city attorney beyond the power of the mayor to remove him with the requisite consent of the Board at any time the mayor so desires.

The Springfield District applied §79.240 to a city treasurer who, with the city attorney, is appointed by the mayor under §79.230. In State ex rel. Kendall v. Wilson, 151 Mo. App. 719, 132 S.W. 623 (1910), the court held the power contained in this Section allowed the city to remove the city treasurer without any charges or hearing. This holding applies to the city attorney because that office and the treasurer are given identical treatment in the two Sections mentioned.

Assuming without deciding the personnel code applied to the city attorney, it necessarily follows that Russell was not protected from removal by such code, but was subject to being removed by the mayor with the requisite consent on the part of the Board at any time the mayor chose to remove him.

Russell contends the personnel ordinance prevents his summary removal because such ordinance is an exercise by the Board of the power granted to it by the last sentence of §79.240. That power allows the Board to pass ordinances to regulate the manner of impeachments and removals. The definition of manner was taken from Webster's New International Dictionary, 2d Ed. in State ex rel. Stamm v. Mayfield, 340 S.W. 2d 631, 634 (Mo. banc 1960). The court there gave the definition of manner as "1. a way of acting; a mode of procedure; the mode or method in which something is done or in which anything happens; way; mode; * * *."

The power granted here is for the Board to prescribe the method, mode or way in which impeachment or removal would be made. Russell would have this court construe the personnel code to prohibit his firing except for cause and with notice and hearing. He contends this is a way or mode in which he could be removed. It is apparent the personnel code contains a limitation on the right of the mayor to remove the city attorney, which limitation is not contained in §79.240. Thus, the personnel code did go beyond the manner or mode by which the mayor could exercise his right to remove the city attorney at any time he desired and to this extent the personnel code is in conflict with such Section as applied to the city attorney.

It would be perfectly proper for the City to prescribe by ordinance that removals should be made by the mayor upon certain forms or by filing a certain statement or order with the Board and specify the form in which the Board would signify its consent. The personnel code did not address the manner or mode of carrying out the power conferred by §79.240. It follows the personnel code may not be construed to have been passed to prescribe the manner in which removals are made.

In his appeal, Russell states the court should have found that his removal was ineffective because he was appointed by ordinance but was removed by resolution. His argument points out that a resolution is less formal than an ordinance and that action taken by ordinance can only be superseded by action taken by ordinance and not by resolution. The ordinance appointing Russell is relied upon as the ordinance which cannot be superseded by resolution.

The fact overlooked by this argument is that Russell was not properly appointed by ordinance since §79.230 provides the appointment can only be made by the mayor with the consent and approval of a majority of the members of the Board. Here, the City apparently followed the procedure of evidencing the approval of the Board by an ordinance. However, this does not change the law to convert Russell's appointment to one made by the Board by ordinance. Under the law the appointment could only be made by the mayor and the ordinance can be only regarded as the necessary approval given by the Board. In that circumstance, there was no action taken by ordinance which was superseded by the resolution approving the order of the mayor removing Russell. In short, the form by which the Board either gave its approval to the

appointment of the attorney, or to the removal of the attorney, is not specified in the statutes. Therefore, the consent could take the form of an ordinance or a resolution, or for that matter, could merely be signified by motion duly passed with the requisite number voting in favor. For that reason, the resolution approving Russell's removal did not supersede the ordinance by which he was purportedly appointed.

Russell relies on a number of cases in which a city officer was appointed for a specified term and in which the court held under those circumstances the official could only be removed for cause and after notice and hearing. As demonstrated above, Russell was not appointed for a specified term. For that reason, those cases are not applicable to the facts herein.

Russell also cites cases in which removal was attempted when the law governing the appointment required cause for removal. Those cases, likewise, have no application.

Russell further contends his appointment was actually by the Board of Aldermen pursuant to the provision in §79.230 which gives the mayor and Board of Aldermen the power to employ special counsel by ordinance. There is nothing in the ordinance appointing Russell which indicates he was appointed as a special counsel, and his continuous service at a monthly salary of $1125 per month for about three years would not be consistent with the concept of special counsel embodied in this Section. All of the evidence in this case indicated Russell was appointed as the city attorney and not as a special counsel.

It should be noted Russell neither alleged nor proved that his removal was motivated by a desire to curtail

or to penalize the exercise of his constitutionally protected rights. Thus, his removal in a summary manner pursuant to the statute does not violate his constitutional rights. Bishop v. Wood, ... U.S. ....., 96 Sup. Ct. 2074 (1976).

The conclusion must follow that under §79.240 the mayor of the City of Raytown was exercising the power conferred upon him by that Section when he removed Russell as city attorney and the majority of all the members of the Board of Aldermen consented to such removal. Because his removal was authorized by law, Russell is not entitled to any compensation following the date of his removal.

The judgment is reversed.

All concur.

William E. Turnage
Presiding Judge

APPENDIX B

MISSOURI COURT OF APPEALS
KANSAS CITY DISTRICT

No. KCD 27,921

JOHN C. RUSSELL,
Plaintiff-Respondent,

v.

CITY OF RAYTOWN,
Defendant-Appellant.

and

No. KCD 27,922

JOHN C. RUSSELL,
Plaintiff-Appellant,

v.

CITY OF RAYTOWN,
Defendant-Respondent.

ALTERNATIVE MOTION FOR RE-HEARING OR TO TRANSFER TO THE SUPREME COURT

(Filed November 16, 1976)

Comes now John C. Russell and moves the Court grant a re-hearing of the appeal herein, under Rule 84.17 V.A.M.R., or alternatively, that the Court order this cause transferred to the Supreme Court, under the terms and provisions of Rule 83.02, on the grounds and for the reasons as follows:

1. The opinion by this Court in this cause is an unconstitutional impingement upon the legislative power dele-

gated to the Board of Aldermen of the City of Raytown, and thus a violation of Article 2, Section 1, of the Constitution of the State of Missouri, in holding:

(PAGE TWO OF OPINION)

"Section 79.230 grants to the mayor of a fourth class city, with the consent and approval of the majority of the members of the Board of Aldermen, the power to appoint a city attorney. No point is made in this case concerning the failure of the record to show Russell's appointment by the mayor with the consent and approval of the Board, and this Court will not take further note of that fact. At least, Russell was a de facto city attorney."

(PAGE 6)

"* * * The ordinance appointing Russell is relied upon as the ordinance which cannot be superseded by resolution.

The fact overlooked by this argument is that Russell was not properly appointed by ordinance since Section 79.230 provides the appointment can only be made by mayor with the consent and approval of a majority of the members of the Board. Here, the City apparently followed the procedure of evidencing the approval of the Board by an ordinance. However, this does not change the law to convert Russell's appointment to one made by the Board by ordinance. Under the law the appointment could only be made by the mayor and the ordinance can be only regarded as the necessary approval given by the Board. In that circumstance, there was no action taken by ordinance which was superseded by the resolution approv-

ing the order of the mayor removing Russell. In short, the form by which the Board either gave its approval to the appointment of the attorney, or to the removal of the attorney, is not specified in the Statutes. Therefore, the consent could take the form of an ordinance or resolution, or for that matter, could merely be signified by motion duly passed with the requisite number voting in favor. For that reason, the resolution approving Russell's removal did not supersede the ordinance by which he was purportedly appointed."

For the reasons that:

(a) The facts of record conclusively demonstrate that:

(1) The office of *City Counselor* was one *created by ordinance* (Plaintiff's Exhibit 1): and (2) John C. Russell was *hired or appointed* to fill that office *by enactment of another ordinance* (Plaintiff's Exhibit 2), which provided in clear and express language:

* * *

"WHEREAS, there now exists a vacancy in the Office of City Counselor and same should be filled by appointment until such time as the services of said appointee *shall expire, by resignation or termination by the said Board of Aldermen* and,

WHEREAS, the *Board of Aldermen* of the City of Raytown, having interviewed the said John C. Russell and being fully advised in the premises, feel that he fulfills all requirements for the holding of said office.

NOW THEREFORE, BE IT ORDAINED, by the Board of Aldermen that John C. Russell be and he is hereby *appointed City Counselor* of the City of Raytown, Missouri, for performance of the duties of said office at a compensatory rate as defined and *set forth in ordinance* number 102, Section IV-C-2 of the compiled ordinances of the City of Raytown.* * *"

(b) The Board of Aldermen of the City of Raytown were specifically authorized by the legislature of the State of Missouri to enact both those ordinances by the general powers conferred on it under Sections 79.110 and 79.470, V.A.M.S.; and

(c) Section 79.230, by its terms does not provide the exclusive manner for the hiring or appointment of lawyers to fill an office created by ordinance; and

(d) Therefore, the ordinance hiring or appointing John Russell is not a violation of Section 71.010, because not in conflict with Section 79.230;

And the opinion of this Court in holding as quoted above overlooks, misapplies and misinterprets the above established rules of law and matters of fact shown conclusively by the record here.

2. The opinion of this Court further overlooks, misapplies or conflicts with the facts of record, the express terms and provisions of §§ 79.230 and 79.240 and rules of law relating to construction of ordinances and Statutes established by Supreme Court cases, with which the opinion is in utter conflict, in holding that:

(a) John Russell was appointed by the mayor to the office of City Attorney under §79.230 [such conclusion of this Court is erroneous because the ordinance appointing John Russell is in direct conflict with such conclusion of this Court *since that ordinance* by which John Russell was so appointed *states the appointment is made by the Board of Aldermen,* and, further, such ordinance so appointing John Russell appoints him to an office created by another ordinance, and not the office of City Attorney specified in the Statute!];

(b) The mayor is granted the power to remove at will under §79.240, and any ordinance which requires cause conflicts with §79.240 [such opinion by this Court is so erroneous because §79.240 by its express terms contains no such grant of power to the mayor, but requires the Board of Aldermen consent thereto and nothing in §79.240 purports to prohibit the Board of Aldermen from passing restrictions in extending or refusing its consent and, specifically, grants the Board of Aldermen power to enact ordinances "regulating" when it will and will not grant its consent]; and

(c) John Russell was subject to termination at the will of the mayor under §79.240 [the opinion is so erroneous because such power granted the mayor under §79.240 is not even applicable to John Russell for the reason: (1) He was appointed by an ordinance by the Board of Aldermen (to an office created by another ordinance) by which ordinance the Board of Aldermen reserved to itself the right and power to remove or terminate John Russell's employment; and/or (2) John Russell does not come within the "appointive officers" subject to removal by the mayor

under §79.240, because not appointed by the mayor under §79.230; and/or (3) No consent was properly obtained from the Board of Aldermen to remove John Russell under §79.240, because there was no compliance with the terms and provisions of the "personnel code" by the Board of Aldermen in extending its consent] and

(d) The "personnel code" contains a limitation on the *right* of the mayor under §79.240 to remove at will [the opinion is so erroneous because §79.240 by its express terms, *strictly construed as required,* does not give any such right to the mayor, but only allows removal at will if a majority of the Board of Aldermen consent thereto; and such section contains no limit on how, why or when the Board of Aldermen may so consent and grants the Board of Aldermen power to regulate the manner in which it will grant its consent]

For the reasons that the opinion of this Court: (1) Totally fails to find any repugnancy between the ordinance appointing John C. Russell and §79.230, and fails to find such repugnancy between the "personnel code" and §79.240, which repugnancy it is required to find to declare the ordinances invalid or to avoid them, as the opinion here seeks to do; and (2) Fails to harmonize those ordinances with the Statutes, or construe those ordinances and the Statutes so they are in harmony. That the opinion thus and thereby conflicts with Article 2, Section 1, of the Constitution of the State of Missouri, *Neal* v. *Independent Realty Company,* 317 Mo. 1235, 298 S.W. 363, 371 (Mo. Sup., 1927), *City of Flat River* v. *Mackley,* 212 S.W. 2d 462, 468 (Mo. Sup., 1948), *Hewlett* v. *Womack,* 196 S.W.

2d 809, 815 (Mo. Sup., 1946), *Kansas City* v. *LaRose*, 524 S.W.2d 112, 116-117 (Mo. En Banc., 1975), *State* v. *Darby*, 137 S.W.2d 532, 536-537 (Mo. Sup., 1940) and *Vest* v. *Kansas City*, 355 Mo. 1, 194 S.W. 2d (Mo. Sup., 1946).

3. The opinion overlooks the holding by the St. Louis Court of Appeals in *Edwards* v. *City of Kirkwood*, 162 Mo. App. 576, 142 S.W. 1109 (St. Louis App., 1912), with which the opinion here conflicts, and fails to reconcile that case with the case of State ex rel. *Kendall* v. *Wilson*, 151 Mo. App. 719, 132 S.W. 623 (Sp. App., 1910).

4. That in holding John Russell subject to removal at the will of the mayor, this Court overlooks the fact and misapplies the law in that; by enactment of the personnel code, as authorized in the last sentence of §79.240, the Board of Aldermen of the City of Raytown thereby promised to all its employees, including plaintiff, that no termination would occur except for lack of qualification, merit or fitness; that the City thus and thereby contracted with all its employees, and became obligated to all its employees, to refrain from terminating them save for lack of merit or fitness; that by attempting to terminate plaintiff, John Russell, without any determination under the personnel code, the City of Raytown, Missouri breached its contractual duties to John Russell in this respect.

5. That by reason of the foregoing, plaintiff requests the Court grant a re-hearing of the appeal herein and on the re-hearing affirm the judgment below, or, alternatively, that the Court order this cause transferred to the Supreme Court, because of the conflicts aforesaid and because of the general importance of the question involving "personnel codes" enacted by cities of the third class or

which may be enacted by cities of the third class by which employees are retained or promoted on the basis of merit or fitness, which under the holding and opinion of this Court are nullities.

/s/ Robert K. Ball, II
Robert K. Ball, II
820 Home Savings Building
1006 Grand Avenue
Kansas City, Missouri 64106
471-6900
Attorney for John C. Russell,
Respondent (KCD 27,921)
Appellant (KCD 27,922)

Jackson & Sherman
Kansas City, Missouri
Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served upon Richard Cole, Attorney for the City of Raytown this 16 day of November, 1976.

/s/ Robert K. Ball

IN THE
SUPREME COURT OF MISSOURI

Case No. .....

JOHN C. RUSSELL,
Plaintiff-Respondent,

vs.

CITY OF RAYTOWN,
Defendant-Appellant.

and

JOHN C. RUSSELL,
Plaintiff-Appellant,

vs.

CITY OF RAYTOWN,
Defendant-Respondent.

MOTION TO TRANSFER FROM MISSOURI COURT OF APPEALS, KANSAS CITY DISTRICT, TO MISSOURI SUPREME COURT EN BANC (RULE 83.03 V.A.M.R.)

Comes now John Russell and moves the Court enter its Order transferring this cause to this Court from the Missouri Court of Appeals, Kansas City District, and as grounds therefor states as follows:

1. That the opinion of the Court of Appeals is in conflict with decisional authority of this Court in the following particulars:

A. In *State* v. *Gates*, 190 Mo. 540, 89 S.W. 881 (en banc, 1906), *Sluder* v. *St. Louis Transit Company*, 189 Mo. 107, 88 S.W. 648, 651 (en banc, 1905) and

State v. *Darby*, 137 S.W.2d 532, 536 (Mo., 1940) it is held by this Court that a grant of legislative authority to a municipality (that is a grant of the power to pass ordinances) is a grant of the power of legislation to that municipality, that the common council of a city is to be free from judicial control in the exercise of such power because such freedom is required by Article 2, Section 1 of the Constitution of Missouri; and that the qualifications, tenure and compensation for public offices and positions is peculiarly within that legislative power.

B. In *Kansas City* v. *LaRose*, 524 S.W.2d 112, 117-118 (Mo. en banc, 1975) and *State* v. *Womack*, 196 S.W.2d 809, 815-816 (Mo. en banc, 1946) it is held that in order for an ordinance to be declared invalid under §71.010, V.A.M.S., the ordinances must permit an act which a state statute prohibits or prohibit an act which a state statute permits;

C. In *Neil* v. *Independent Realty Company*, 317 Mo.1235, 298 S.W. 363, 371 (1927) it is held that where ordinances and statutes relate to the same person or thing or the same class of persons or things they are *in pari materia* and are to be construed together as one law and harmonized if possible;

D. In *Judson* v. *Smith*, 104 Mo. 61, 15 S.W. 956 (1891) this Court long ago declared the law to be that statutes providing a procedure for summary removal were to be strictly construed (against such summary removal).

That the Court of Appeals opinion conflicts with each of these rules by holding:

(1) (Page 2 of opinion)" §79.230 grants to the mayor of a fourth class city, when the consent and approval of a majority of the members of the Board of Aldermen, the power to appoint a city attorney. No point is made in this case concerning the failure of the record to show Russell's appointment by the mayor with the consent and approval of the Board, and this Court will not take further note of that fact.* * *

(Page 6) "* * * The ordinance appointing Russell is relied upon as the ordinance which cannot be superseded by resolution.

The fact overlooked by this argument is that Russell was not properly appointed by ordinance since §79.230 provides the appointment can only be made by the mayor with the consent and approval of a majority of the members of the Board. * * * Under the law the appointment could only be made by the mayor and the ordinance can be only regarded as the necessary approval by the Board. In that circumstance, there was no action taken by the ordinance which was superseded by the resolution approving the order of the mayor removing Russell. In short, the form by which the Board either gave its approval to the appointment of the attorney, or to the removal of the attorney, is not specified in the statutes.* * *"

(2) [In holding that §79.240 prohibits application of the personnel code to your applicant to prohibit his removal.] (Page 3) "It is, of course, a matter of settled law that an ordinance of the city must be in harmony with the state statutes. §71.010, R.S.Mo. 1969, *Kansas City* v. *LaRose*, 524 S.W.2d 112, 116 [6] (Mo. banc, 1975)."

(Page 4) "Because the state law confers on the mayor the power to remove the city attorney at any time it suits his pleasure, with the consent of the majority of all the members of the Board, it follows an ordinance of the city which in any way restricts this power is contrary to the state law and cannot impinge the authority of the mayor to remove the city attorney. §71.010.* * *"

* * *

"Assuming without deciding the personnel code applied to the city attorney, it necessarily follows that Russell was not protected from removal by such code, but was subject to being removed by the mayor with the requisite consent on the part of the Board at any time the mayor chose to remove him."

(Page 5) "Russell contends the personnel ordinance prevents his summary removal because such ordinance is an exercise by the Board of the power granted to it by the last sentence of §79.240 * * *"

"The power granted here is for the Board to prescribe the method, mode or way in which impeachment or removal would be made. Russell would have this Court construe the personnel code to prohibit his firing except for cause and with notice and hearing. He contends this is a way or mode in which he could be removed. It is apparent the personnel code contains a limitation on the right of the mayor to remove the city attorney, which limitation is not contained in §79.240. Thus, the personnel code did go beyond the manner or mode by which the mayor could exercise his right to remove the city attorney at any time he desired and to this extent the personnel code is in

conflict with such section as applied to the city attorney."

"It would be perfectly proper for the city to prescribe by ordinance that removal should be made by the mayor upon certain forms or by filing a certain statement or order with the Board and specify the form in which the Board would signify its consent. * * *"

(3) (Pages 3 and 4 of opinion) "* * * Strictly construing 79.240, it remains that this section clearly gives the mayor, with the consent of a majority of all the members of the Board, the power to remove the city attorney at will.* * * This statute needs no construction to hold that the mayor is given the power to remove the city attorney at any time it suits his pleasure, provided a majority of all the members of the Board consent."

That the above quoted portions of the opinion conflict with the controlling decisional law of this Court set forth in paragraphs A through D, above, in this:

(a) the record in this case conclusively shows without question that the Board of Aldermen of the City of Raytown, Missouri, created an office known as city counselor and city prosecuting attorney by enactment of an ordinance, and appointed John Russell to city counselor by enactment of another ordinance, all of which was clearly within the legislative power granted the Board of Aldermen of the City of Raytown, Missouri by the General Assembly by enactment of §79.110 and §79.470, V.A.M.S.; by failing to recognize that power in the Board of Aldermen the opinion of the Court of Appeals directly conflicts with

the decisional authority of this Court set forth in paragraph A above;

(b) by holding §79.230 confers an exclusive power of appointment on the mayor, thereby depriving the Board of Aldermen of the power to appoint John Russell to an office created by another ordinance, the opinion of the Court of Appeals creates a conflict between the ordinances and the state statutes, when there is none, and fails to harmonize the ordinances and state statutes, all in conflict with the decisional authority of this Court as set forth in paragraphs B and C above;

(c) the opinion of the Court of Appeals in construing §79.240 to:

(i) grant the mayor a right and power to remove John Russell from the office of city attorney [when he was appointed to the office of city counselor]:

(ii) prohibit the Board of Aldermen from enacting a personnel code applicable to its approval of the removal of the city counselor, (because such restriction conflicted with the right and power granted the mayor), and

(iii) extend to John Russell and the office of city counselor to which he was appointed by enactment of an ordinance,

conflicts with the decisional authority of this Court set forth in paragraphs B, C and D. This, because, when §79.230 and §79.240 are construed together it is obvious they are inapplicable to John Russell because he was not appointed under 79.230; and even

so, the last sentence of §79.240 specifically authorizes the Board to enact personnel codes for application to at least the offices named in §79.240. These conclusions are required by the decisional authority of this Court as set forth in paragraphs B through D above, which the Court of Appeals failed to follow.

2. In holding that the personnel code of the City of Raytown was in conflict with §79.240, and that the mayor had the right and power to remove John Russell at will, the opinion of the Court of Appeals conflicts with *Edwards* v. *City of Kirkwood,* 162 Mo.App., 576, 142 S.W. 1109 (St.L.App., 1912), *Waller* v. *Jones,* 218 Mo.App., 130, 262 S.W. 455, 457 (K.C.App., 1924) and the rationale of *Pearson* v. *City of Washington,* 439 S.W.2d 756, 760, 762 (Mo., 1969).

3. Under the decisional authority in *State* v. *Kent,* 98 Mo.App., 281, 71 S.W. 1066 (K.C.App., 1903) and *Layne* v. *City of Windsor,* 442 S.W.2d 497 (Mo., 1969) the personnel code duly enacted by the City of Raytown became a part of its contract with John Russell, which the Court of Appeals opinion completely ignores in allowing termination of John Russell at the will of the mayor, in violation of said contractual provisions.

4. In *Julian* v. *Mayor, Councilmen and Citizens of the City of Liberty,* 391 S.W.2d 864 (Mo., 1965) and *Layne* v. *City of Windsor,* 442 S.W.2d 497 (Mo., 1969) this Court declares the rule of law to be that an ordinance of a city cannot be repealed, changed nor affected except by enactment of another ordinance; and, specifically, that a resolution works no change whatsoever upon an ordinance. By holding that John Russell's appointment by an ordinance of the City of Raytown (plaintiff's exhibit 2, Suggestion) was terminated by the administrative order and confirmatory resolution (plaintiff's exhibits 7 and 8, Suggestions) the above quoted portions from pages 2 and 6 of the opinion of the Court of Appeals is in direct conflict with this established rule of law.

5. A copy of the opinion of the Court of Appeals (filed November 1, 1976), this applicant's Alternative Motion For Rehearing Or To Transfer To The Supreme Court (filed in the Missouri Court of Appeals November 16, 1976) and the Notice from the Court of Appeals of the Order denying said Motion For Transfer (dated November 29, 1976) are attached hereto as exhibits A, B and C respectively.

WHEREFORE, your applicant prays the Court enter its Order transferring this cause to the Missouri Supreme Court En Banc.

/s/ Robert K. Ball
Robert K. Ball, II
820 Home Savings Building
1006 Grand Avenue
Kansas City, Missouri 64106
471-6900

Attorneys for Plaintiff-Respondent
Plaintiff-Appellant

Of Counsel:
Jackson & Sherman

IN THE
SUPREME COURT OF MISSOURI

Case No. 59947

STATE OF MISSOURI AT THE RELATION OF
JOHN C. RUSSELL, RELATOR,
Petitioner,

vs.

HONORABLE JACK P. PRITCHARD,
CHIEF JUDGE,

AND

CHARLES SHANGLER, DAVID J. DIXON, BEN W. SWOFFORD, SOLBERT M. WASSERSTROM, RONALD L. SOMERVILLE, and WILLIAM E. TURNAGE, JUDGES OF THE MISSOURI COURT OF APPEALS, KANSAS CITY DISTRICT,

AND

MARY LOUISE THOMAS, CLERK,
MISSOURI COURT OF APPEALS,
KANSAS CITY DISTRICT,
Respondents.

PETITION FOR WRIT OF CERTIORARI

Comes now Relator and for his Petition For Writ of Certiorari states:

1. Relator states that the Honorable Jack P. Pritchard now and was at all times hereinafter mentioned Chief Judge of the Missouri Court of Appeals, Kansas City, District, and the Honorable Charles Shangler, David J. Dixon, Ben W. Swofford, Solbert M. Wasserstrom, Ronald L. Somerville and William E. Turnage are now and were at all times hereinafter mentioned Judges of the Missouri Court of Appeals, Kansas City District and the Honorable Mary Louise Thomas was and is at all times hereinafter mentioned Clerk of the Missouri Court of Appeals Kansas City District, all duly appointed and acting as such.

2. That on March 21, 1975 an appeal was lodged in the Missouri Court of Appeals Kansas City District, where it was given docket number 27921, wherein the City of Raytown, Missouri, appealed from a judgment entered by the Honorable Harry A. Hall, Judge of Division 10 of the Circuit Court of Jackson County, Missouri, in favor of plaintiff John C. Russell in the amount of $45,-447.74, in a certain cause styled John C. Russell, plaintiff, vs. The City of Raytown, Missouri defendants, bearing docket number 757520 in said Court; that on March 24, 1975, John C. Russell filed his Notice of Appeal in said Missouri Court of Appeals from that part of the judgment entered by the Honorable Harry A. Hall, aforesaid, which denied plaintiff relief on Count I of his petition, and said Appeal was given docket number 27922 in said Missouri Court of Appeals. That said Appeals were consolidated by Order entered on April 17, 1975. That thereafter, the transcript on appeal and briefs were duly filed in said Missouri Court of Appeals Kansas City District.

3. That thereafter the cause was docketed for argument in the September session, 1976, of the Missouri Court of Appeals, Kansas City District, and said cause was argued on September 29, 1976 to Division 3 of said Court, consisting of the Honorable William E. Turnage, Presiding Judge and the Honorable Robert R. Welborn and Andrew J. Higgins, Special Judges.

4. That on November 1, 1976 there was filed in the Missouri Court of Appeals, Kansas City District an opinion by said Court, attached hereto as Exhibit A, by which said Court reversed the judgment entered by the Honorable Harry A. Hall.

5. That thereafter, and on November 16, 1976, Relator duly filed in the Missouri Court of Appeals, Kansas City District, his Alternative Motion For Rehearing Or To Transfer To The Supreme Court [Exhibit B hereto] which said Motion was denied by said Court by Order entered November 29, 1976 [copy of the Notice of said Order is attached hereto as Exhibit C].

6. That thereafter, and on December 28, 1976, Relator filed with this Court his Motion To Transfer said cause to this Court, where it was docketed number 59947, which said Motion was denied by this Court by Order entered January 10, 1977.

7. That this petition for Writ of Certiorari lies herein because:

(a) The opinion by the Missouri Court of Appeals, Kansas City District, is in conflict with Article I, Section 10 of the Constitution of the State of Missouri and the Fourteenth Amendment to the Constitution of the United States, in that said opinion finds facts which are not supported by evidence in the record of the trial of this cause and finds facts which are contrary to the facts of record in the trial of this cause; thus and thereby requiring this Court assume jurisdiction of said cause under the terms and provisions of Article 5, Section 3 of the Constitution of the State of Missouri; and/or

(b) Article 5, Sections 4 and 10 of the Constitution of the State of Missouri grants superintending control in this Court over the Missouri Court of Appeals, Kansas City District and the power and authority to hear and determine causes coming to it from the Court of Appeals by certiorari; in that

(i) Rule 83.03, V.A.M.R., under which Relator's Motion To Transfer was filed in this Court, does not specifically permit or require transfer where the opinion of the Court of Appeals is in conflict with a constitutional provision, but requires such conflict be with an opinion of this Court; and

(ii) There are no statutory provisions nor rules of this Court whereby the Appellate Jurisdiction of this Court conferred under Article 5, Section 3 may be exercised, as required thereby, when the opinion by the Court of Appeals in fact conflicts with the Constitution of the State of Missouri or the Constitution of the United States and, therefore, there is no adequate remedy by an appeal.

(c) By reason of the foregoing Relator shows to this court, as required by Rule 84.22, V.A.M.R., that adequate relief cannot be afforded by an appeal or by application for this Writ to any lower Court; and/or

(d) Issuance of the Writ of Certiorari by this Court to the Missouri Court of Appeals, Kansas City District, is necessary to protect the rights granted Relator under Article I, Section 10, and the Fourteenth Amendment to the Constitution of the United States,

as required by Article I, Section 14 of the Constitution of the State of Missouri.

8. That the opinion of the Court of Appeals is in conflict with Article I, Section 10 of the Constitution of Missouri and the Fourteenth Amendment to the Constitution of the United States, and is therefore an abuse of the jurisdiction granted the Missouri Court of Appeals, Kansas City District, in the following particulars!

On pages 5 to 6 of its opinion, the Court of Appeals states and holds:

> "In his appeal, Russell states that the Court should have found that his removal was ineffective because he was appointed by ordinance but was removed by resolution. His argument points out that a resolution is less formal than an ordinance and that action taken by ordinance can only be superseded by action taken by ordinance and not by resolution. The ordinance appointing Russell is relied upon as the ordinance which cannot be superseded by resolution.
>
> The fact overlooked by this argument is that Russell was not properly appointed by ordinance since §79.230 provides the appointment can only be made by the mayor with the consent and approval of a majority of the members of the Board. *Here, the City apparently followed the procedure of evidencing the approval of the Board by an ordinance. However, this does not change the law to convert Russell's appointment to one made by the Board by ordinance. Under the law the appointment could only be made by the mayor and the ordinance can only be regarded as the necessary approval given by the Board. In that circumstance, there was no action taken by ordi-*

> *nance* which was superseded by the resolution approving the order of the mayor removing Russell. In short, the form by which the Board either gave its approval to the appointment of the attorney, or to the removal of the attorney, is not specified in the statutes. Therefore, the consent could take the form of an ordinance or resolution, or for that matter, could merely be signified by motion duly passed with the requisite number voting in favor. For that reason, the resolution approving Russell's removal did not supersede the ordinance by which he was purportedly appointed."

Such finding by the Court of Appeals is violative of the rights granted Relator under Article I, Section 10 of the Constitution of Missouri and the Fourteenth Amendment to the Constitution of the United States in that:

(a) The ordinance by which Russell was in fact appointed was not in any sense an approval by the Board of an appointment made by the mayor, as shown by said ordinance attached hereto as Exhibit D.

(b) There was no evidence in the transcript of the trial of this cause upon which to base a finding of approval of the mayor's appointment in the ordinance by the Board;

(c) Save Exhibit D attached hereto, there was no trial exhibit showing any appointment of Relator to the office referred to in the Court of Appeals opinion.

That the foregoing part of the opinion of the Court of Appeals therefore constitutes a finding without evidentiary support and is therefore lacking in due process, in viola-

tion of Article I, Section 10 of the Constitution of Missouri and the Fourteenth Amendment to the Constitution of the United States, and said Court of Appeals in said opinion therefore exceeds or abuses the jurisdiction conferred upon it under Article 5, Section 3 of the Constitution of the State of Missouri.

WHEREFORE, Relator prays this Court to issue a Writ of Certiorari directed to Respondents in their official capacity requiring them to certify to this Court a true, full and complete copy of the entire record of this case and to have such record returned to this Court before any date this Court may designate, in order that this Court may review the legality of such proceedings and make such other and further adjudications and orders therein as right and justice may require all as provided under Article 5, Sections 4 and 10 of the Constitution of the State of Missouri.

John C. Russell
10216 E. 72nd Street
Raytown, Missouri
Relator

STATE OF MISSOURI)
) SS
COUNTY OF JACKSON)

Comes now John C. Russell, Relator herein, and first being duly sworn upon his oath states that he is Relator herein and has read the above petition and knows the contents thereof and that he believes the matters and things therein stated are true according to his best knowledge and belief.

John C. Russell

Subscribed and sworn to before me this ..... day of ....., 1977.

.....
Notary Public

My Commission Expires:

Robert K. Ball II
800 Home Savings Building
1006 Grand Avenue
Kansas City, Missouri 64106
471-6900
Attorney for Relator

Of Counsel:
Jackson & Sherman

IN THE
SUPREME COURT OF MISSOURI

No. 59947

KCD No. 27921
JOHN C. RUSSELL,
Plaintiff-Respondent,
vs.
CITY OF RAYTOWN,
Defendant-Appellant.
and
KCD No. 27922
JOHN C. RUSSELL,
Plaintiff-Appellant,
vs.
CITY OF RAYTOWN,
Defendant-Respondent.
and
No. 59947
STATE OF MISSOURI AT THE RELATION OF
JOHN C. RUSSELL, RELATOR,
Petitioner,
vs.
HONORABLE JACK P. PRICHARD, CHIEF JUDGE,
MISSOURI COURT OF APPEALS, KANSAS
CITY DISTRICT, et al.
Respondents.

FIRST AMENDED NOTICE OF APPEAL TO SUPREME COURT OF THE UNITED STATES

Notice is given that John C. Russell, Plaintiff-Respondent (KCD 27921), Plaintiff-Appellant (KCD 27922) and Relator-Petitioner (Mo.Sup.Ct. 59947), herein appeals from the judgment entered in this action on the 19th day of December, 1974, by the Circuit Court of Jackson County, Missouri, from that part of the judgment denying relief on Count I of his Petition (Motion to Amend and/or for New Trial overruled by said Circuit Court on the 14th day of March, 1975) and from the opinion of the Missouri Court of Appeals, Kansas City District filed November 1, 1976, affirming the judgment entered by the Circuit Court on Count I of the original Petition and reversing the judgment entered on Count II in favor of Appellant herein as entered by the Circuit Court; further, from the Order of the Missouri Court of Appeals, Kansas City District, overruling Relator-Appellant his alternative Motion for Rehearing or to Transfer to the Supreme Court of Missouri on November 29, 1976, and from the Order of the Supreme Court of Missouri denying Appellant's Application to Transfer on January 10, 1977, and from the Order of the Supreme Court of Missouri denying Petition for Writ of Certiorari on March 14, 1977.

The party appealing in this matter is John C. Russell, Plaintiff-Respondent, Plaintiff-Appellant and Relator-Petitioner, all in the Courts below and he does appeal from that part of the judgment entered in this cause on the 19th day of December, 1974, relative to Count I of his original Petition by said Jackson County Circuit Court pertaining to the question of a conflict between the meaning and legal effect of a Resolution and an Ordinance,

thus ruling contrary to decisional authority of the Missouri Supreme Court, and from the opinion rendered by the Missouri Court of Appeals, Kansas City District, on November 16, 1976, affirming the Circuit Court decision as to Count I and reversing the Circuit Court judgment as to Count II of Appellant's original Petition, the latter affecting the method of hiring of Appellant by said City as its attorney and the breach of an implied contractual relationship between said City and said Appellant, including a discriminate refusal of hearing pursuant to request by Appellant, thus violating his rights to due process of law contrary to the Fourteenth Amendment of the Constitution of the United States, in addition to the subsequent Orders of the Missouri Court of Appeals, Kansas City District, and the Supreme Court of the State of Missouri overruling Motions for Rehearing, Transfer and Writ of Certiorari, all in accordance with and pursuant to 28 U.S.C. 1257(3) and 28 U.S.C. 2101(c).

Dated this 7th day of June, 1977.

Don M. Jackson
Jackson & Sherman
820 Home Savings Building
Kansas City, Missouri 64106
471-6900

and

John C. Russell, Pro Se
10216 East 72nd Street
Raytown, Missouri 64133
358-1959

Attorneys for Plaintiff-Respondent, Plaintiff-Appellant, Relator-Petitioner

Copy of the above and foregoing First Amended Notice of Appeal mailed this 7th day of June, 1977, to Robert Neds, 210 Blue Ridge Professional Building, 9503 East 63rd Street, Raytown, Missouri 64133, Attorney for Defendant-Appellant, Defendant-Respondent.

John C. Russell